THE UNIVERSITY OF MONTANA RECOMMENDATIONS AND VIEWS ON PROMOTING DISTANCE EDUCATION THROUGH DIGITAL TECHNOLOGIES[1]

U.S. Copyright Office Public Hearing
UCLA -- February 10, 1999

I. INTRODUCTION

The University of Montana appreciates the opportunity to collaborate with the Copyright Office and other interested participants in identifying, and helping shape, the direction of future federal distance education legislation. The University strongly believes that distance education offers unprecedented learning opportunities for today's postsecondary education students. To develop these opportunities fully, however, Congress must craft new laws to free universities from the specter of looming legal liabilities and costly, protracted litigation in the area of copyright infringement law which even legal experts seldom understand or agree upon in an academic setting.

U.S. universities have a unique perspective on copyright, as the campuses and their faculties are among the country's largest producers and consumers of copyrighted works. Higher education institutions therefore find themselves in the somewhat paradoxical position of advocating stringent copyright protection laws to protect their own works, while simultaneously advocating the broadest fair use parameters for the purpose of disseminating knowledge contained in copyrighted works to their student and other constituencies. Distance education presents some very difficult copyright and other legal challenges to U.S. postsecondary education institutions because it has already enhanced the demand for new forms of copyrighted digital materials used in distance education courses; while likewise increasing the demand for digital information in a manner which may well be rendering present fair use laws obsolete. It is with these concerns in mind that The University of Montana summarizes below its recommendations and thoughts for Copyright Office and Congressional consideration.

First, Congress should grant U.S. higher education institutions the broadest possible fair use rights to make all instructional materials available in digital form, while expanding fair use principles for <u>all</u> electronic and non-electronic instructional materials as long as such materials are not being commercially marketed for sale above cost.

Second, Congress should exempt higher education institutions,

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their employees and their students from legal liability and onerous litigation costs arising from inadvertent or non-material infringement claims so that U.S. higher education can dedicate finite economic resources to enhancing distance education. In addition, Congress should modify copyright infringement jurisdiction and venue laws to address these concerns as suggested below.

Third, Congress should consider enacting legislation which prohibits copyright licensors from financially penalizing distance education students who access any licensed copyright materials from remote sites. Distance education students should have the same access rights to electronic databases and other information as any other students able to access such materials on campus.

Fourth, Congress should make any necessary federal financial aid law revisions to ensure financial aid eligibility for all distance education students by expanding the present distance education pilot project requiring limited distance education waivers to include all accredited higher education institutions.

Finally, Congress should promote distance education partnerships involving postsecondary distance education providers, libraries, elementary and secondary schools, and business communities, by making grant funds available for such partnerships to design and utilize distance education courses.

The University has addressed below these and other specific points regarding distance education issues.

II. DISTANCE EDUCATION FROM THE UNIVERSITY OF MONTANA PERSPECTIVE

The University of Montana educates approximately 15,000 students at four campuses serving western and southwestern Montana. These campuses include:

- The University of Montana, Missoula, which offers a rich array of undergraduate, graduate, professional and high demand vocational-technical programs at three different Missoula campus locations.

- Montana Tech of The University of Montana in Butte, with internationally renowned undergraduate and graduate Engineering degrees plus a number of other undergraduate and vocational-technical programs.

- Western Montana College of The University of Montana in Dillon, which focuses heavily on the formation of elementary and secondary education teachers and also offers important undergraduate liberal arts plus vocational-technical programs to a large rural area of the state.

- Helena College of Technology of The University of Montana in Helena, which specializes in two-year vocational-technical programs linked closely to Montana's skilled labor job markets.

Since 1994, The University of Montana has been a single University directed by its President in Missoula, Chancellors in Butte and Dillon, and the Helena College of Technology Dean.

The University of Montana has a long history in pioneering and providing electronic distance education programs and courses dating back some 30 years. For example:

- The Missoula campus Business School was among the first in the U.S. to offer distance MBA programs through interactive video technology to students at remote sites; and today the Business School offers these programs to students in a number of Montana's more populated areas. Based on these successes, the School's new building contains state-of-the-art technology which provides high quality distance education programs of all types.

- The Missoula campus Education School created a very successful Master's program based on a contemporary distance learning model with classes at the Helena campus for teachers and administrators, whose graduate degrees were awarded more rapidly, and more cost effectively to the students and the University alike, than some of the School's more traditional graduate programs.

- The Butte campus recently responded to a professional consultation request from a group of South American senior mining sector executives by providing a half-day interactive electronic seminar with presentations by several Montana Tech faculty.

- In 1995, the University opened its Informational Technology Resource Center to meet ever-increasing Internet World Wide Web and multi-media course design and production demands, with University Computer Science, Mathematics, Music, and Radio/ Television faculty plus students from all academic disciplines participating.

- Western Montana College of The University of Montana is presently establishing a Rural Technology Center to provide educational programs and assistance for the rural populations served by that campus, with the Center linking itself directly to other University campuses which will

collectively collaborate in these endeavors.

- The University has recently concluded two new agreements with high technology companies for the provision of Internet courses in all disciplines and the online publication of Montana legal materials, respectively, with the objective of reaching both national and international audiences.

- The University is working very closely with other Montana University System campuses and other western state higher education institutions and systems in the design and implementation of the Western Governors University, presently the leading U.S. multi-state distance learning initiative.

These examples illustrate some of the University's efforts to meet today's Montana distance education demands.

University of Montana interests and commitments regarding distance education require little explanation. As a state with a very large land mass, diverse and often inaccessible topography, harsh climate, few sizable population centers, a highly rural economy, plus the greatest number of Indian reservations in the United States, Montana demands effective postsecondary education programs and delivery systems reflective of these realities. The University recently concluded its five-year Strategic Directions Plan with a major emphasis on enhancing technology-based distance education programs. This Plan comprehensively attempts to identify and then confront the needs for achieving this objective at a time when University resources available for doing so remain modest.

Based on the University's distance education experiences to date, as noted above and otherwise, the University recognizes that distance education in the next century must become part of a national and international framework if the U.S. is to remain globally competitive and maintain its world leadership role. Such a framework requires modern, simple laws which all involved can readily understand and respect because they wish to rather than because they must. Congress took important initial steps in the recently enacted Digital Millennium Copyright Act by attempting to simplify some of the more complex electronic copyright liability issues; and perhaps more importantly, by recognizing the need for a more systematic approach towards federal distance education legislating by requiring the Register of Copyrights to conduct these hearings and seek public input on suggested legal changes.

The legal complexities affecting U.S. higher education even after the diligent work done by Congress last year may needlessly impede the meaningful development of U.S. distance education in a manner detrimental to U.S. national interests. For this reason, The University of Montana welcomes this chance to provide its own perspective about how Congress might effectively confront these

challenges in its future distance education deliberations.

III. THE NATURE OF DISTANCE EDUCATION

Distance education, also referred to as distributed education or distance learning,[2] delivers to students new ways of learning, new ways of getting a degree, and new things to learn. Distance education is primarily associated, at least today, with delivering educational services to students in remote locations. However, traditional, on-campus students who want to fill gaps in their education by taking courses only available elsewhere, and even students who cannot register for closed courses at their campuses, are also manifesting increased distance education interest. Additionally, some students use distance education courses to accelerate their degree programs or for remedial support. These new, on-campus constituencies must be taken into account in any legislation designed to promote distance education.

Synchronous communication with instructors and other students, use of the Internet as a research archive, and chat rooms for dialogue with other students are among many unique opportunities

[2] "Distributed education" refers specifically to the broad range of educational opportunities created by new information technologies and the concomitant unbundling of traditional courses of study. Students can choose from among a greater variety of courses and develop a broader range of skills when they can select instructional modules from several institutions. "Distance education" or "distance learning" sometimes refers only to video instruction, whether interactive or not, while "distributed education" is a newer term meant to reflect the full range of technological possibilities. *See Technology and the Virtual University ? Opportunity and Challenge: Hearings Before the Subcomm. on Higher Education of the Senate Comm. on Labor and Human Resources,* 105th Cong. (1997) (statement of William H. Graves, Chief Information Technology Officer, University of North Carolina at Chapel Hill, on behalf of the American Association of State Colleges and Universities, the American Council on Education, Educom, the National Association of State Universities and Land-Grant Colleges, and U.N.C.-Chapel Hill). Another term occasionally used is "ALN," or Asynchronous Learning Network, which refers to group-based education deliverable whenever and wherever a particular group member wants to access it. *See Asynchronous Learning Networks and the Consortium for Manufacturing Competitiveness: Hearings Before the Subcomm. on Technology of the House Comm. on Science and the Subcomm. on Early Childhood, Youth, and Families of the House Comm. on Education and the Workforce*, 105th Cong. (1998) (statement of Stuart A. Rosenfeld, President, Regional Technology Strategies).

offered by effective distance education. Satellite and videotape technology have long made it possible for students in remote areas to sit in a classroom hundreds of miles away, but digital technology now makes it possible for these same students to ask questions or make comments to instructors and each other; and to participate actively inside and outside the classroom, right along with all other students. Electronic access to multiple libraries now provides vast bibliographic resources to students who otherwise would have to travel many miles, often with great difficulty in states like Montana characterized by harsh climate and rough terrain, if they chose to study at all. Distance learning now permits students to access these materials off campus, through digital books and digitalized copies of original documents. Even tactile information can be transmitted through fiber-optic wire.

Because it is learner-focused, distance education varies significantly from traditional education. Digital technologies give students powerful tools for tailoring instruction to their own individual needs and interests. A traditional student listens to lectures and occasionally participates in class discussion or a laboratory experiment. Electronic communication enhances traditional instruction by facilitating contact between students and instructors, and among students. These methods are educationally tried and true, but digital technologies offer students something better. Instead of seeing and hearing the same information all other students see and hear, for example, a marketing student can focus on information of interest and relevance by clicking into hypertext to expand on it. Instead of watching computer simulations, future environmental engineers can perform their own varying factors as they see fit, tracking the differences those factors make. Medical students may soon practice suture technique by desktop computer; while physiotherapy students do limb manipulation online.

The educational value of these technologies is further enhanced by their capacity to foster collaboration among students who would otherwise work alone. A recent New Jersey Institute of Technology statistical study found that students randomly chosen to carry out a course assignment by using computers and collaborating with other students outperform students who complete the same assignment in a more traditional manner. However, *students who used computers did worse than traditional students when the former did not collaborate with other students*.[3] This suggests that distance education, whether synchronous or asynchronous, can only improve student learning experiences when it incorporates collaboration to the fullest possible extent.

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[3] *See Asynchronous Learning Networks and the Consortium for Manufacturing Competitiveness: Hearings Before the Subcomm. on Technology of the House Comm. on Science and the Subcomm. on Early Childhood, Youth, and Families of the House Comm. on Education and the Workforce*, 105th Cong. (1998) (statement of Stuart A. Rosenfeld, President, Regional Technology Strategies).

IV. UNIVERSITY OF MONTANA DISTANCE EDUCATION LEGAL CONCERNS

The University has identified below several specific legal concerns related to distance education for possible attention by Congress. Although some of these concerns go beyond the technical jurisdiction of the Copyright Office, it is hoped that the Copyright Office will include these concerns in its final distance education report to be presented to Congress on April 1.

A. Broadening Fair Use Exemptions For Distance Education And Traditional Course Materials Alike

In reviewing the Digital Millennium Copyright Act debate during the last session of Congress and based upon the University's diverse educational experiences to date, the University has concluded that there should be little or no difference between fair use exemptions for distance education and more traditional copyrighted instructional materials. The mere existence of any such difference in the law tends to breed confusion, uncertainty and the enhanced likelihood of noncompliance. The University believes that current fair use exemptions from federal copyright law must be broadened for distance education and more traditional course materials alike because of the new opportunities and challenges posed by the former.

To promote full realization of distance education's potential, course materials must be made freely available in electronic form. In addition, students must be able to utilize these materials fully and share copies of them with each other and their instructors. To succeed in the labor market, students must also be able to demonstrate to prospective employers an ability to work with and apply relevant course materials without regard to extraneous copyright legal concerns. For example, students seeking jobs with high technology employers may have a legitimate need to show how they might improve existing computer programs or their applications without fearing any copyright infringement liability as a result. In these respects, student and educator needs for fair use exemption in digital media are no different from their needs for such exemption in print media.

The University has no objection to limiting access to digital course materials to enrolled students. The University likewise recognizes the need to limit at least some access to electronic databases and archives through the use of temporary site licenses to the extent such licenses prove necessary or desirable for licensor, licensee and students. Educational content providers may also be expected to inform their students of any copyright restrictions on course materials and to explain any limits on student use of such materials. Once any copyright restrictions begin exceeding those noted here, however, course content selection and knowledge access become artificially restricted because higher education institutions face potential liability for contributory or inadvertent infringement. To ensure the most beneficial student

educational experiences, higher education institutions must be relieved of this inhibiting prospect.

The Digital Millennium Copyright Act sensibly and correctly exempts campuses from liability when transmission of digital materials constitutes infringement, at least so long as the campuses take no active part in directing the transmission. In this regard, Congress is to be commended for partially addressing concerns expressed by the U.S. higher education community.[4]

This first step, however, does not go far enough. It merely shifts the liability burden from the campuses themselves to their faculty and students, who often do not even know they may be infringing copyright because present fair use definitions are inadequate guides. Future distance education legislation must focus here on clarifying and expanding fair use definitional criteria for all instructional materials in today's digital age.

Congress, the U.S. higher education community and the U.S. commercial publishing industry have never agreed on either copyright fair use definitional criteria or their application in an educational setting. The one Congressional attempt to legislate in

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[4] *See* Higher Education Alliance for Information Technology, "Higher Education Policies for the Digital Age," http://www.nasulgc.nche.edu/DigitalAge_TOC.htm (11/26/97), *cited in Educating Our Children with Technology Skills to Compete in the Next Millennium: Hearings Before the Subcomm. on Technology of the House Comm. on Science and the Subcomm. on Early Childhood, Youth, and Families of the House Comm. on Education and the Workforce*, 105th Cong. (1998) (statement of Graham B. Spanier, President of the Pennsylvania State University, on behalf of the National Association of State Universities and Land-Grant Colleges' Commission on Information Technologies, the University Consortium for Advanced Internet Development, and Penn State). The Higher Education Alliance is a coalition of six major higher education associations, representing nearly 3,000 colleges and universities. Its members are the American Association of Community Colleges, the American Association of Colleges and Universities, the American Council on Education, the Association of American Universities, the National Association of Independent Colleges and Universities, and the National Association of State Universities and Land-Grant Colleges. Three other organizations are allied with the Alliance: the Association of Research Libraries, Educom, and the University Continuing Education Association. Nine other organizations endorse the document "Higher Education Policies for the Digital Age": the American Council of Learned Societies, the Association of College and Research Libraries, the Association of College and University Telecommunications Administrators, CAUSE (the Association for Managing and Using Information in Higher Education), the Coalition for Networked Information, the Council of Graduate Schools, the Council on Government Relations, the National Association of College Stores, and the National Initiative for a Networked Cultural Heritage.

this area failed to provide specific statutory criteria; and instead resulted in 1976 U.S. Congressional Committee Report language suggesting educational fair use guidelines which were inadequate to meet higher education needs even when they were proposed in a pre-digital era.[5] Various higher education interests warned at the time of their inadequacy and overly restrictive scope regarding classroom materials copying; and perhaps prophetically, no agreement could ever be reached at all among any of these diverse interests with regard to classroom use of audio-visual works. These guidelines seem particularly outdated today, as Congress considers the distance education legal framework of the future.

For example, the 1976 guidelines permit a teacher to make a single copy of a book chapter, periodical or newspaper article, short story, chart, graph, etc. for research or teaching use. This single copy permission has little meaning in today's digital world when thousands of students in a single distance learning course taught by one or more teachers may soon become the rule rather than the exception. The multiple copies guideline, based upon brevity, spontaneity and cumulative effect, expressly limit such copying to "no more than nine instances for one course during one class term."[6] There has never been agreement on how the "nine instances" language should be interpreted or applied in practice; and in a digitalized distance learning environment, such small numerical restrictions seem to make little sense.

More importantly, the lack of any guidelines for audio-visual works in today's multi-media digital instructional environment reflects a total lack of certainty about what can be legally done in the classroom. The one contemporary effort by higher education and commercial publisher interests to establish such guidelines broke down in failure when more higher education interests rejected the resulting proposed guidelines than would accept them; and many commercial publishers likewise rejected them as too permissive.[7]

Perhaps the most significant fair use issue affecting higher education today is the inability of courts to interpret or apply the 1976 guidelines or other fair use legal principles consistently enough to provide campuses with meaningful guidance about permissible copying. Reflective of this concern is the *Princeton Univ. Press v. Michigan Document Services*.[8] The case, which

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[5] H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. (Sept. 29, 1976) (Conference Report); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (Sept. 3, 1976) (1976 House Judiciary Committee Report); S. Rep. No. 94-473, 94th Cong., 1st Sess. (Nov. 20, 1975) (1975 Senate Judiciary Committee Report).

[6] 1976 House Report, id. at 68.

[7] Conference on Fair Use Proposed Educational Fair Use Guidelines for Digital Images, Distance Learning and Multimedia, 53 Pat. Trademark & Copyright J. (BNA) 125 (Dec. 19, 1996).

[8] 99 F.3d 1381 (6th Cir. 1996) (*en banc*), *cert. denied*, 520 U.S. 1156 (1997).

involved the fairly straightforward issue of how many copies of copyrighted materials could be lawfully reproduced by a commercial copier for campus classroom use, resulted in four separate conflicting opinions by the 13 federal appeals court judges who could not agree on most aspects of the case. These judges had difficulty even agreeing on whether or how the 1976 guidelines noted above should be applied to resolve the case; and decided it against the commercial copier based on profitability.

This judicial foray into a simple non-digital case with very problematic results disregarded the important fact that most photocopying of copyrighted works is done on campus by the educational institutions themselves with no profit motive at all. Moreover, in the digital reproduction context for distance education course materials it is usually a single faculty member, or perhaps a student, who will personally reproduce and transmit the work for academic purposes. Congress neither can nor should ignore any longer the need for clarifying copyright fair use principles in the academic setting to clarify such legal uncertainty.

The distance education deliberations soon to be undertaken afford Congress the opportunity to do so. As already noted, the University sees little need to distinguish between distance education and more traditional forms of education in defining academic fair use exemptions. A definition setting forth clear and realistic fair use criteria for technology-driven distance education course materials, including multi-media materials, should readily apply to all other forms of materials. As to the content of such criteria, Congress should think and act expansively for the purpose of permitting the broadest possible access to informational materials by students and faculty in their educational pursuits with very precise indicators of infringement liability.

In advocating precise and much more liberal fair use criteria for campuses, however, the University would qualify this position by insisting that such expanded fair use be limited to a non-commercial context where the sale of copyrighted materials for profit is not considered acceptable fair use. Such an approach would place the emphasis on where it belongs by requiring commercial vendors and reproducers of copyrighted works to pay licensing royalties or otherwise get copyright holder permission, while permitting faculty members and students who need copyrighted materials quickly and inexpensively to obtain them for academic use with few or no restrictions. This will notably enhance distance education programs without sacrificing copyright owner rights.

B. Clarifying Current Copyright Laws Applicable to Jointly Authored and Owned Copyrighted Course Materials

University distance education in the future will almost certainly involve multiple academic institutions collaborating with each other through their respective faculties in course material preparation and delivery. Professor Nimmer, perhaps the leading

U.S. expert on copyright, correctly notes that present federal copyright law erroneously defines "joint work" on the basis of joint authorship.[9] Because most distance education activities, and particularly those likely to occur in the future, involve multiple authorship and ownership, perhaps now is the time for Congress to consider the need for clarifying this distinction.

Professor Nimmer suggests that copyrighted joint work be defined to include work resulting from (1) joint authorship; (2) the transfer of copyright by its original author or owner to any other person(s); (3) transfer of undivided interest in the copyright by its author or owner to any other person(s); (4) transfer by author or owner death through will or intestacy to any other person(s); (5) the vesting of any copyright renewal rights in more than one person; or (6) copyright owned jointly because of state community property laws. Perhaps one means of clarifying present law in such instances could be an amendment of the federal joint work statute to require an agreement specifying joint ownership as a condition for claiming it, with a separate provision expressly implying such an agreement based on all relevant factors to the extent one does not exist. Public interest would seem to suggest that as joint works become more prevalent because of distance education, some clearer statutory guidance imposing certain protections for all copyright owners in a given work would seem appropriate.

C. Clarifying Digital Millennium Copyright Act ISP Notice Provisions for Liability Limitation Purposes

The Digital Millennium Copyright Act exempts an Internet Service Provider (ISP), whether an educational institution or a private entity such as America Online, from liability for infringement when infringing material is stored on the network by a network user.[10] However, a copyright owner may compel an ISP to remove or disable access to allegedly infringing material by giving the ISP proper notice of a good-faith belief that the material is infringing.[11] Moreover, the ISP must attempt to contact a complaining party who does not fully comply with Act notice provisions, but who has provided both information sufficient to identify the allegedly infringing material and an address where the complainant may be contacted.

In the distance education context, these well-intended provisions can potentially disrupt many non-infringing academic courses because the Act presently appears to require an ISP to remove or disable access to allegedly infringing material merely upon receiving notice of the alleged infringement before performing its own internal investigation.[12] The Act thus encourages an ISP

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[9] M. Nimmer & D. Nimmer, 1 NIMMER ON COPYRIGHT ? 6.01, at 6-3 (1996) (citing 17 U.S.C. ? 101).

[10] *See* 17 U.S.C. ? 512(c).

[11] *See* 17 U.S.C. ? 512(c)(3)(A)(v), (vi).

[12] *See* 17 U.S.C. ? 512(c)(1)(A)(iii), (C).

to remove allegedly infringing course materials without determining whether infringement has occurred, even while a course is still in progress and after students have paid their fees to take it, because the Act expressly bars the students themselves from suing the ISP for any unwarranted disruption.[13] This is apparently an unintended consequence of otherwise legitimate Act purposes, but failure to change these provisions could seriously hamper U.S. distance education development.

Perhaps the best approach for solving this problem would exempt an ISP expressly and *in toto* from infringement liability for all student course materials in bona fide distance education activities. The nature of digital technologies is such that an ISP will not always have time to conduct a reasonable investigation, nor would an ISP necessarily have expertise to determine whether allegations of infringement are supportable. An ISP exemption for distance education course materials will absolve the ISP of responsibility to remove the content of distance education courses in a manner detrimental to the entire educational process. For example, Congress might consider amending 17 U.S.C. ? 512(c) (a new Digital Millennium Copyright Act provision) along following lines:

> (c) INFORMATION RESIDING ON SYSTEMS OR NETWORKS AT DIRECTION OF USERS. ?
> (1) IN GENERAL. A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider ?
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> (A) . . .
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> (iii) upon obtaining such knowledge or awareness [that the material or an activity using the material on the system or network is infringing], acts expeditiously to remove, or disable access to, the material;
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> (B) . . .
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> (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.
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> <u>(D) Notwithstanding provisions (A)(iii) and (C) of this subsection, a service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at</u>

[13] *See* 17 U.S.C. ? 512(g)(1).

> the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider stores such material for the purpose of facilitating access to bona fide educational course materials, whether required or recommended, or to curricular materials generally. A service provider is not relieved of liability under this provision when the service provider fails to remove, or disable access to, the bona fide education course or curricular material upon the request of the higher education institution which authorized the materials for such course or curriculum.

(new proposed language underlined).

This new language would exempt an ISP from liability if it merely acts as a distance education host. It is important to note that higher education institutions may deliver distance education materials through private service providers, such as America Online, or through other higher education institutions. Copyright liability for course content or curricular materials (such as software interfaces or administrative forms or plans) should be predicated on intentional infringement by the sponsoring institution or the instructor, if at all.

D. Modifying the Prohibition Against Circumvention of Technological Measures to Protect Copyrighted Works

The Digital Millennium Copyright Act postpones implementation of the new, strict-liability prohibition on circumvention of copyright protection systems for a two-year period so that the Librarian of Congress, the Register of Copyrights, and the Assistant Secretary for Communications and Information of the Department of Commerce may determine whether the new prohibition adversely affects or will likely affect noninfringing uses of copyrighted works.[14] This delay clearly serves the public interest, because the contemplated prohibition poses significant problems for distance education providers.

Prohibiting circumvention and carving out exceptions for persons who are or will likely be harmed by the prohibition create legal uncertainty about what types of circumvention should be permitted. This uncertainty is compounded by the Act's strict-liability prohibition, which holds persons liable for circumvention *even when it results in no infringement of copyright and even when no infringement is intended.* Although the University understands and even agrees with the goal of barring unwarranted interference with campus blocking technologies, the lack of specific criteria defining when circumvention will or will not be legal results in too much subjective guessing to develop meaningful compliance.

Each course provider attempting to develop a distance

[14] *See* 17 U.S.C. ? 1201(a)(1)(A), (C).

education (or any other) course must consider whether each use of technologically protected, copyrighted work proposed for course inclusion is noninfringing, based on fair use criteria, as one requirement for overcoming the strict liability prohibition.[15] As already demonstrated, present fair use criteria in an academic context may well be impossible to agree upon and therefore the course provider has little comfort under current law.

The more troubling aspect of the circumvention prohibition is the lack of any practical exception permitting access to blocked copyrighted works available through distance education courses for reasonable fair use copying purposes (assuming fair use can be readily determined). In other words, even the 1976 guidelines permit persons to copy certain pages from hard copy texts by merely obtaining a copy of the text through a library or perhaps a friend. The Act does not appear to permit this form of copying, since prohibiting circumvention of course provider blocking technology apparently eliminates any viable means of copying the blocked work for fair use. As U.S. library interests have correctly noted in expressing their concerns, the anti-circumvention provisions promote the locking up of digital materials and render them completely inaccessible to anyone not authorized to see them. This goes well beyond any reasonable restrictions applicable to hard copy print. These provisions seem unfair and counterproductive to the national need for treating digital and non-digital information, as well as access to such information, identically.[16]

An additional concern regarding the circumvention provisions warrants consideration here. Although the Act language itself is far from clear regarding the U.S. Government role in providing for exceptions, it does seem to suggest that only federal government agencies will decide when lawful access to digital copyrighted works for fair use purposes through such circumvention is to be granted. Leaving aside the lack of clear fair use criteria under current law, this Act language suggests the role of federal agencies as censors empowered to block fair use access to such works in a manner heretofore never permitted. Treating electronic and non-electronic copyrighted work access identically to the fullest extent practicable avoids this problem and also likely prevents major constitutional challenges to any such restrictions.

On a more practical note, if the Act empowers the government to identify legally accessible materials every few years, distance education course providers have little incentive to use new

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[15] *See* 17 U.S.C. ? 1201(a)(1)(B).

[16] The Act exemption for nonprofit libraries, archives, and educational institutions addresses only circumvention by those entities when they are attempting to determine whether to purchase a technologically protected copyrighted work, and only if the work is not reasonably available in some other form. The exemption does not address the needs of users who wish to exercise their fair use rights to copy portions of such a work after a library purchases it. *See* 17 U.S.C. ? 1201(d)(1), (2).

materials not so identified by the government in their courses; and the quality of such courses will suffer. In addition, distance education users and providers are not the only ones likely to suffer under such a restrictive rule. Consumers, new entrepreneurs and small business owners, who cannot afford to purchase the right to access every protected work in which they are interested, will lose access to these works to the nation's detriment.[17]

The above problems can perhaps be best averted by amending 17 U.S.C. ? 1201(a)(1)(A) to prohibit circumvention of protective technological measures only when circumvention intends to deprive either copyright owners or blocking technology users of clearly established legal rights. Imposing a mens rea requirement removes the prohibition from the realm of strict liability and absolves persons engaging neither in infringement nor other illegal activity (such as computer hacking or password theft) of liability for circumventions which harm no legal interests. For example, 17 U.S.C. ? 1201(a) (the Act prohibition) might be amended to read:

> VIOLATIONS REGARDING CIRCUMVENTION OF TECHNOLOGICAL MEASURES. ? (1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title <u>for the purpose of wilfully depriving a copyright owner or user of the technological measure of any legal right related to such measure</u> . . . .

E. Prohibiting Technology Licensing Financial Penalties for Distance Education Students

One present distance learning issue not yet focused on by Congress is the extent to which present vendors of technology needed for viable distance education, particularly software and database access technology, penalize postsecondary institutions and their students in distance education courses with technology licensing site-based restrictions. Universities routinely receive technology licensing agreements which either attempt to prohibit, or financially penalize, access by students off-campus.

The marketplace has not corrected this problem, because most technology vendors tend to adopt a common policy and U.S. higher education lacks the resources to develop alternative access and delivery mechanisms. In addition, many of these licensing agreements reflect a sincere and legitimate attempt to protect copyrighted materials by limiting access to such materials only to

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[17] *See Testimony Regarding Implementation of the December 1996 WIPO Copyright and Phonograms Treaties: Hearings on H.R. 2281 and H.R. 3048 Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Comm. on Commerce*, 105th Cong. (1998) (statement of Robert L. Oakley on behalf of the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association).

bona fide students. Congress can help address this problem by leaving intact current copyright infringement laws, while simultaneously adopting federal legislation making clear that vendors may not discriminate against educational institutions or their students by treating distance education students differently in any licensing agreements from traditional, site-based students. Such legislation would have an immediate effect of making distance education more accessible, attractive and affordable without compromising legitimate copyright protections.

F. Establishing Exclusive Federal Jurisdiction and Venue Where the Distance Education Provider is Located

Future distance education legislation should address the costly litigation burdens caused by federal copyright infringement claims arising from such education. The University strongly urges the Register of Copyrights to recommend to Congress that such cases can only be filed, for jurisdiction and venue purposes, in the U.S. District Court where the distance education provider is located. One can only imagine the Bleak House horror stories likely to arise from distance education courses offered to hundreds (or thousands) of students in sites all over the U.S. and abroad. Jurisdiction and venue issues involving all cyberlaw disputes have rapidly emerged as very complex matters for courts to resolve, with inconsistent decisions to date. These problems can be readily avoided, however, by limiting jurisdiction and venue in any distance education claims, copyright or otherwise, subject to federal jurisdiction to the federal court where the activity initiates. Failure to do so might well chill distance education activity nationwide based on liability and litigation defense costs alone. This would be a needless result, when its avoidance is so easily prevented.

G. Distance Education Financial Aid And Assistance

Congress must necessarily review all federal financial aid programs and laws for the purpose of assessing their applicability (or lack thereof) to distance education. It has become U.S. reality that most postsecondary education academic courses are funded in substantial part through financial aid. Little evidence to date suggests that distance education courses will not be subject to the same financial aid dynamic. Congress already recognized this dynamic by requiring federal financial aid eligibility rules waivers for some higher education institutions on a pilot project basis in last year's Higher Education Reauthorization Act, but the duration of this pilot project is perhaps too long and could unfairly penalize tens of thousands of students already enrolled in quality distance education courses.

Congress must consider whether to treat distance education courses offered for academic credit identically to all other academic credit courses for financial aid eligibility purposes. Congress must further determine how such aid should be distributed when more than one postsecondary institution participates in

delivering a student's distance education courses. For example, many distance education learners may need to utilize a nearby postsecondary campus for the sole purpose of accessing another institution's courses (such as the distance education graduate student using nearby community college distance education technology to access a remote university's graduate courses). There seems to be no reason why federal financial aid programs cannot be modified to provide at least some financial aid resources for both campuses in such circumstances.

Another financial aid issue to be considered in any national distance education legislation is ensuring financial aid resources sufficient for distance education students to acquire computer hardware and software needed for accessing distance education courses they wish to take. It is not altogether clear that current federal financial aid programs readily permit such acquisitions unless a student receiving aid is already enrolled and being treated as a resident student. In any event, to the extent Congress wishes to promote aggressive, widespread distance education programs, financing the necessary technology for the students and the distance education providers will be needed.

H. Distance Education Partnership Needs

Congress should consider aggressively promoting distance education partnerships, through specially targeted funding, which are likely to increase distance education's quality and reach. For example, Congress should encourage efforts to link up public libraries as part of any effort to promote and enhance distance education. This will give distance education providers readier access to rural, lower-income and other constituencies likely to benefit the most from distance education.[18] In addition, Congress should encourage distance education providers to develop much closer ties with elementary and secondary education for the purpose of developing programs for students and teachers alike at all levels. Finally, Congress should encourage distance education partnerships between providers and local business communities. Congress can effectively promote such partnerships, which by their very nature enhance the quality and productivity of the U.S. workforce, by targeting federal grant incentives for distance education programs designed by and for these partnerships.[19]

I. Distance Education Network Funding

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[18] *See* Community Colleges' Use of Technology: Hearings Before the Subcommittee on Technology of the House Committee on Science, 105th Cong. (July 21, 1998) (statement of Diana Oblinger, Manager, Academic Programs & Strategy, IBM Global Education Industry).

[19] *See Community Colleges in the Twenty-First Century ? Tackling Technology: Hearings Before the Subcomm. on Technology of the House Comm. on Science*, 105th Cong. (1998) (statement of Robert A. Parilla, President, Montgomery College (Md.)).

Congress must continue to fund research and development projects such as Internet 2 and Next Generation Internet; and encourage research universities to develop their own capabilities for accommodating broadband networks for media integration, interactivity, high-quality video conferencing, and real time collaboration.[20] These initiatives, in addition to their tremendous potential to enhance all applications, are crucial to optimal distance education development. Widespread national distance education programs in the U.S. may well require more federal funds for the supporting technology needed to develop them.

J. Additional Copyright Office Question Responses

The University has set forth below responses to questions posed by the Copyright Office to the extent such responses are not included in the above views and recommendations.

1. Additional Nature of Distance Education Points

The University has provided a definition about the nature of distance education generally shared by the U.S. higher education community. Based on the University's own experience and knowledge in this field, it would be safe to say that from a practical standpoint distance education encompasses virtually every point and question raised in the Copyright Office's December 23, 1998 Federal Register Notice about this hearing. In addition, issues related to funding, accreditation, sponsorships and recipients of distance education programs are perhaps as diverse as, although not necessarily too dissimilar from, issues related to non-distance education activities on campus except for the use of all forms of technology to make learning and teaching available to more students throughout the state. As distance education technology and programs begin developing and coming into their own on an even more widespread basis, ample statistical information will become available quite rapidly to develop more meaningful profiles describing its nature.

2. Distance Education Licensing.

As already noted above, universities as licensees of technology and information linked to distance learning have faced contracts penalizing distance education remote site students. The University has also experienced serious difficulties in persuading certain licensors to accept distance education students accessing the licensed material as part of the University's overall student population for access purposes. Although distance education technology may well prove able to resolve many licensing difficulties from the standpoint of helping create legitimate

[20] *See* Testimony of Graham Spanier, Chair of the Commission on Information Technology of the National Association of State Universities and Land-Grant Colleges, House Science Committee, ?Basic Research FY 98 Budget - National Science Foundation,? April 9, 1997.

access safeguards, to date this has not necessarily occurred.

As further noted above, copyright fair use principles and their application at higher education campuses pose a major problem area for distance and more traditional educational activities alike. Until clearer and broader fair use definitions become available, distance education technology will likely exacerbate these problems rather than resolve them. On a related point, even though technology has made obtaining copyright permissions cheaper and easier, the permission process itself remains seriously flawed because there is often no way to obtain responses from copyright holders in timely fashion needed to use materials in courses. The University nonetheless acknowledges that copyright clearinghouses have proved workable to date in at least some respects.

Finally, the University believes that there should be no material difference of any kind between distance education and other students regarding distance education student access to all electronic information sources and resources available to on-campus students. As long as any student is enrolled, the means by which the student takes particular courses should have little relevance to the informational services available for meeting student academic needs.

3. Technology Use

As noted above, distance education and its supporting technology exist in virtually all forms identified in the December 23 Copyright Office Federal Register Notice. The University would nonetheless make two further observations regarding technology. First, there is a very serious shortage of inexpensive access in U.S. higher education to interactive video technology able to ensure and provide high quality video and sound imaging for distance education course delivery and receipt. Long distance telephone charges alone make interactive video technology courses expensive enough to keep the numbers of such courses still relatively low; and present technologies do not adequately permit students at different remote sites to interact very effectively with each other. For interactive video distance education instruction to flourish, these problems must be resolved.

Second, interactive distance education instruction using individual student computer monitors in a live video, non-text context remains all but non-existent in the U.S. to date. It appears that no one has fully developed a plan for using present computer technology to address this need. Given the vast numbers of personal computer monitors in the U.S. today, this remains an untapped source of very large scale future distance education activity and perhaps symbolizes one of distance education's initial core goals of allowing each individual to develop meaningful learning programs for themselves without regard to location. Congress should consider funding the research and development for such technology to emerge more rapidly in an applied way.

4. Additional Fair Use Comments

As already noted and emphasized repeatedly above, copyright fair use laws require dramatic expansion and clarification for campuses. This expansion in turn requires legislation, because voluntary guideline efforts to date have never worked and likely never will. Permitting non-commercial fair use of digital and non-digital copyrighted materials for teaching and learning purposes in a distance education setting or otherwise, while continuing to impose strict copyright protections on commercial use of such materials, will effectively solve this problem. Attempting to impose quantitative restrictions for distance education with worldwide participation potential will not work. In addition, since international copyright agreements to which the U.S. is a party already provide for relatively expansive non-commercial fair use, no international treaty obligation will be compromised.

V. CONCLUDING COMMENTS

In conclusion, The University of Montana thanks the Copyright Office for receiving the opportunity to submit these recommendations and views. They attempt to address both current and likely future issues needed to be resolved effectively for Congress to achieve its distance learning objectives in the best U.S. national interests.

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